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An Application to Remove a Caveat

In the last edition of Back to Basics, Kylie Downes SC and Ben McEniery discussed some of the principles that apply when lodging a caveat. In this edition, they consider the law and practicalities of seeking an order that a caveat be removed.

Here are some examples of circumstances in which clients may come to you wishing to have a caveat removed.

Your client has entered into a contract to purchase an old hotel, but the contract has not yet settled. The vendor wants the proceeds of sale to pay off debt. However, the vendor's daughter has lodged a caveat claiming an equitable interest in the land arising out of an option to purchase that her father granted her by deed on her 18th birthday. Your client was unaware of this arrangement at the time the contract was formed.

Another client is a property developer who plans to erect a residential complex on the Brisbane River in West End. Late last year, your client entered into a number of option agreements with investors which allow those investors to purchase proposed lots in the complex "off the plan" at an agreed price, should they choose to do so. The agreements are all conditional upon a community titles scheme being established. One of those purchasers has lodged a caveat over the whole of the development site. He claims that the development should now not proceed because it might be inundated if Brisbane has another a flood. Your client is nervous about the caveat because he is contractually obliged to lodge a building format plan for registration by the end of the month.

Yet another client is a bank attempting to have a mortgage registered over a borrower's land. After the bank lodged its mortgage in registrable form, another lender lodged a caveat claiming that it previously lent money to the borrower and therefore ought to have its mortgage registered before your client's mortgage is registered.

Clients such as these require urgent advice and may require representation in an application before the Supreme Court. The following information is designed to address some of the issues that arise when clients bring these sorts of problems to you.

Removal of a caveat

As explained in the last edition of Back to Basics, a caveat is a notice to the Registrar of Titles, which, while it remains in force, prevents the registration of an instrument affecting

the interest claimed by the caveator from the date and time of lodgement.¹ The purpose of lodging a caveat is to create a temporary statutory injunction that ‘freezes’ the register and gives the caveator time to bring an action to enforce or protect an interest.

Section 127 of the *Land Title Act 1994* (Qld) (“Land Title Act”) allows a person affected by a caveat to apply to the Supreme Court for its removal. Section 127 provides that “a caveatee may at any time apply to the Supreme Court for an order that a caveat be removed.”² The section also provides that, “The Supreme Court may make the order whether or not the caveator has been served with the application, and may make the order on the terms it considers appropriate.”³

Caveator and caveatee

The terms, caveator and caveatee, are defined in Schedule 2 to the Act. A caveator, for a lot over which a caveat has been lodged, is a person in whose favour a caveat is lodged.⁴ A caveatee is a registered proprietor of the lot, or someone, other than the caveator, who has an interest in the lot.⁵

The class of persons who have standing to seek removal of a caveat is co-extensive with the class of those entitled to lodge a caveat in respect of the lot. The first limb of the definition of caveatee, which refers to a registered proprietor of the lot, includes anyone with a registered interest, such as the registered owner or a registered mortgagee or lessee.⁶ Where there is more than one registered proprietor or owner, any one of those persons may apply for removal of a caveat without joining the other proprietors as applicants. The second limb, which refers to someone who has “an interest in the lot”, is of broader scope and gives holders of unregistered interests, such as a purchaser of the equitable fee simple, standing to apply for an order that a caveat be removed.

The application can be brought at any time

¹ *Land Title Act 1994* (Qld) s 124(1).

² *Land Title Act 1994* (Qld) s 127(1). Slightly different rules apply to the removal of a caveat lodged by a purchaser under an instalment contract. In this instance the application is governed by s 74(2) of the *Property Law Act 1974* (Qld) rather than s 127.

³ *Land Title Act 1994* (Qld) s 127(2).

⁴ *Land Title Act 1994* (Qld) s 4, schedule 2.

⁵ *Land Title Act 1994* (Qld) s 4, schedule 2.

⁶ The terms, proprietor, registered owner, registered proprietor, are defined in the following way: “**proprietor** of a lot means a person entitled to an interest in a lot, whether or not the person is in possession”; “**registered owner** of a lot means the person recorded in the freehold land register as the person entitled to the fee simple interest in the lot”; and “**registered proprietor** of a lot means a person recorded in the freehold land register as a proprietor of the lot”: *Land Title Act 1994* (Qld) Schedule 2.

An application to remove a caveat can be brought at any time⁷ and is ordinarily brought where a party wishes for a caveat to be removed from the register as a matter of urgency. In some circumstances, it may be commercially feasible to simply allow a caveat to lapse if the caveat is of a kind that will lapse under s 126 and the caveator does not bring an action to enforce his or her interest in the lot. In other circumstances, a party's commercial interests may demand that the caveat be removed without delay.

The application may be necessary if the caveator has refused to withdraw the caveat,⁸ or the registrar is unwilling or unable to do so.⁹ Where the caveat is a non-lapsing caveat, such as where it is lodged by the registered proprietor or the consent of the registered owner is deposited when the caveat is lodged,¹⁰ an application under s 127 may be the only way to remove the caveat from the register.

An application under s 127 may be brought *ex parte*,¹¹ but it may be prudent to give the caveator notice of the application or include the caveator as a respondent. It is not necessary to join the registrar as a respondent in the application.

An application of this kind is a summary application only. This means that many of the substantive questions that may be decided are to be decided at trial, not in the course of the application.¹²

Principles applicable to the removal of a caveat

An application to remove a caveat is essentially in the nature of an application for an interlocutory injunction.¹³ The onus lies with the caveator,¹⁴ who must show that:

1. there is a serious question to be tried; and
2. the balance of convenience favours maintenance of the *status quo* until trial.¹⁵

Serious question to be tried

⁷ *Land Title Act 1994* (Qld) s 127(1).

⁸ A caveator may at any time withdraw a caveat by lodging a request to withdraw it: *Land Title Act 1994* (Qld) s 125.

⁹ The Registrar has power to remove a caveat under s 128 of the *Land Title Act 1994* (Qld).

¹⁰ *Land Title Act 1994* (Qld) s 126(1)(a)-(b).

¹¹ *Land Title Act 1994* (Qld) s 127(2).

¹² *Genrich v Maitland Holdings Pty Ltd* [1982] Qd R 58 at 68.

¹³ *Re Jorss' Caveat* [1982] Qd R 458 at 464; *Re Burman's Caveat* [1994] 1 Qd R 123.

¹⁴ *Re McKean's Caveat* [1988] 1 Qd R 524 at 525.

¹⁵ *Re Jorss' Caveat* [1982] Qd R 458; *Re Burman's Caveat* [1994] 1 Qd R 123; *Cousins Securities Pty Ltd v CEC Group Ltd* [2007] 2 Qd R 520 at 533-4.

As an application for the removal of a caveat is akin to an application for an interlocutory injunction, the caveator must demonstrate a prima facie case which would justify leaving the caveat undisturbed. The High Court in *Australian Broadcasting Corporation v O'Neill* clarified that this involves showing “a sufficient likelihood of success to justify in the circumstances the preservation of the status quo”.¹⁶

The caveator must also give evidence that the caveator has an entitlement to maintain the caveat, that is, that the caveator has a caveatable interest in the land.¹⁷

If the caveator is unable to establish these matters, the court should remove the caveat.¹⁸

Balance of convenience

The caveator must also show that the balance of convenience favours leaving the caveat undisturbed. To do this, the caveator should show the detriment it would suffer, preferably irreparable, if the caveat were removed. For example, the caveator might show that removal of the caveat would lead to the extinguishing of a registered or unregistered interest in the land.

On the other side, the applicant should demonstrate the detriment, irreparable or otherwise, which it, and third parties, will suffer if the caveat is allowed to remain on the register.

As a condition of allowing a caveat to remain, the court will ordinarily require that the caveator give an undertaking as to damages, to compensate the caveatee for any loss suffered as a consequence of the caveat remaining in place until the matter is resolved.¹⁹

An applicant will be able to assist the court to determine whether the balance of convenience favours the removal of the caveat if it is prepared to offer a worthwhile undertaking as to damages or other undertaking which protects the position of the caveator, such as payment into court of an amount representing the value of the caveator's claimed interest. The latter undertaking should not be given lightly.

The originating application

The application will be an originating application made under Chapter 2 Part 4 of the *Uniform Civil Procedure Rules 1999* (Qld) and be in Form 5. The application must specify:

¹⁶ *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 82 (Gummow and Hayne JJ).

¹⁷ *Genrich v Maitland Holdings Pty Ltd* [1982] Qd R 58 at 63.

¹⁸ *Genrich v Maitland Holdings Pty Ltd* [1982] Qd R 58 at 63, 69.

¹⁹ *Cousins Securities Pty Ltd v CEC Group Ltd* [2007] 2 Qd R 520, 536.

1. that the proceeding is an application pursuant to section 127(1) of the Land Title Act to remove a caveat;²⁰
2. the caveat number;
3. the date the caveat was lodged;
4. a description of the lot or lots over which the caveat is lodged (ordinarily by lot on plan description and title reference number);
5. material facts in relation to whether there is a serious question to be tried and whether the balance of convenience favours maintenance of the status quo;
6. the orders sought²¹ (being an order that the caveat, which you should identify by reference to its number and the full description of the lot over which it is lodged, be removed); and
7. any matter that if not stated specifically may take another party by surprise.²²

A party bringing an application to remove a caveat might also seek compensation in the same application under s 130 if the caveat was lodged or left on the register improperly.

The application should be accompanied by supporting affidavit material, which should:

1. attest to the applicant's interest in the lot over which the caveat has been lodged so as to demonstrate that the applicant is caveatee;
2. exhibit a real property search in relation to the lot which shows the caveat on the register;
3. exhibit the caveat;
4. exhibit any notice requiring the caveator to start a proceeding served by the caveatee under s 126(2) of the Land Title Act and any response received;
5. exhibit any correspondence or documents that contradict the grounds claimed in the caveat;
6. provide evidence of the facts necessary to found a submission that there is no serious question to be tried;
7. provide evidence of the prejudice which the applicant and, if possible, unrelated and innocent third parties will suffer if the caveat is permitted to remain on the register. For example, if the lot over which the caveat has been registered is the subject of a contract of sale, then this contract should be exhibited.

The application and any supporting affidavits are to be filed and served on each respondent at least three business days before the date set for hearing the application.²³

²⁰ *Uniform Civil Procedure Rules 1999* (Qld) r 26(6).

²¹ *Uniform Civil Procedure Rules 1999* (Qld) r 26(5).

²² *Uniform Civil Procedure Rules 1999* (Qld) r 149(1)(c).

²³ *Uniform Civil Procedure Rules 1999* (Qld) rr 27(1) and 28(1).

On the other side of the matter, the caveator should produce supporting affidavit material that:

1. attests to the caveator's claimed interest in the lot;
2. provides evidence of, or exhibits any document that is evidence of, the grounds claimed in the caveat as the basis for the caveator's claimed interest in the lot;
3. provides evidence of the facts necessary to found a submission that there is a serious question to be tried;
4. provides evidence of the caveator having commenced proceedings to enforce the claimed interest, or evidence of an intention to do so; and
5. provides evidence of the prejudice the caveator will suffer if the caveat is removed.

Power of the court

In addition to the power to make orders that a caveat be removed or remain, the court may order that a caveat be amended,²⁴ or that the caveat be withdrawn and that leave be given to allow another caveat to be lodged in its place.²⁵

If the application is successful

Where an application for removal under s 127 is successful, this result is communicated to the Registrar by lodging the office copy of the order with a Form 14 General Request.²⁶ While there is no duty payable, there is a lodgement fee.²⁷

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²⁴ *Queensland Estates Pty Ltd v Co-ownership Land Development Pty Ltd* [1969] Qd R 150.

²⁵ *Land Title Act 1994* (Qld) s 129.

²⁶ At present, the form can be downloaded at <http://www.derm.qld.gov.au/property/titles/forms.html>.

²⁷ *Land Title Regulation 2005* (Qld) s 4, Schedule 2; Department of Environment and Resource Management, *Land Title Practice Manual (Queensland)*, Part 11 – Caveat, paragraph [11-2080].